IN THE HIGH COURT OF JUDCIATURE AT MADRAS

DATED 19.08.2006

CORAM

THE HONOURABLE MRS. JUSTICE PRABHA SRIDEVAN

W.P.Nos.14883 & 22114/2006 & M.P.No.1/2006
in W.P.No.22114/2006

AND

W.P.M.P.Nos.15391 & 16707/2006
in W.P.No.14883/2006

V.Gandhimathi .. Petitioner in both W.Ps.

Vs

1.The Excise Commissioner,
Pondicherry.

2.The Deputy Commissioner (Excise)
karaikal, Pondicherry. .. Respondents in both W.Ps.

3.L.Mohamed Mansoor,
The Deputy Commissioner (Excise)
karaikal. .. 3rd Respondent in W.P.14883/06

4.U.S.S.Syed Ibrahim
5.B.Thirumalai Rayan .. 3rd & 4th respondents in
W.P.No.22114/2006

Prayer in W.P.No.14883/2006:

Petition filed under Article 226 of the Constitution of India praying for a writ of mandamus forbearing the 2nd respondent herein in any manner permitting the shifting of the existing liquor shop No.4/2004-2005 standing in the name of Tmt.V.Gandhimathi to any other place without the consent and permission of the petitioner herein and consequently forbearing the running of the liquor shop in any name other than the individual license holder Gandhimathi without due process of transfer of licence with the permission of the petitioner and in accordance with law.

Prayer in W.P.No.22114/2006:

Petition filed under Article 226 of the Constitution of India praying for a writ of mandamus forbearing the respondents 1 and 2 from in any manner permitting the respondents 3 and 4 from

running the liquor shop No.4/2004-2005 licenced in the name of the petitioner, contrary to the FL-I licence issued by the 2nd respondent dated 5.5.2004 without the consent of the petitioner and in accordance with law.

For Petitioner : Mr.K.M.Vijayan, Sr.Counsel
For Respondent : Mr.T.Murugesan, GP, (Pondy)

ORDER

The writ petitioner is the licence holder for retail and wholesale vending of liquor in the Union Territory of Pondicherry. The premises for which the vending licence has been given is No.3, Main Road, Kottucherry, Karaikal. A grant of licence (FL-I licence) is governed by the provisions of Pondicherry Excise Act, 1970 (Act in short) and the Pondicherry Excise Rules made thereunder (Rules in short).

2. Rule 115-A provides for renewal of licence and as per Rule 203, transfer of licence is not permitted except with the previous permission of the Licensing Authority and on payment of double the licence fee that was prevailing at the relevant time.

3. According to the petitioner, one K.Krishnan, without the knowledge of the petitioner claiming to be one of the partners of the shop for which licence is granted, transferred the licence in the petitioner's name to "petitioner and other partners". For the excise year 2004-2005, the 2nd respondent, Licensing Authority issued it in the name of the petitioner and other partners without specifying the names of the partners. The petitioner objected to this by her representation dated 22.10.2005 and legal notice dated 27.10.2005. According to the petitioner, the petitioner was not heard and no opportunity was given before such change in the name of the licensee. The petitioner was further given to understand that clandestinely the 2nd respondent is permitting the shifting of the shop from the place for which the licence was given to another place without the concurrence of the petitioner and without payment of 1/4th licence fee as per Rule 209. The petitioner did not have the required information to file an appeal and therefore, the petitioner approached this Court for a writ of mandamus to the respondents forbearing them from shifting the existing liquor shop No.4/2004-2005 standing in the name of the petitioner without her permission and forbearing the running of the liquor shop in any name other than the individual licence holder, namely the petitioner when the transfer of licence being effected in a manner known to law. This writ petition is W.P.No.14883/2006. The information that was sought for by the petitioner has since been granted.

4. When W.P.No.14883/2006 was admitted, this Court directed the respondents to maintain status quo by order dated 17.5.2006. According to the petitioner, the respondents ignoring the said order permitted respondents 3 and 4 to operate the liquor shop in the same name in Shamuga Winesat the other place, namely at 2/5-220, Main Road, Boalgon Arch, Arumugam Complex, T.R.Pattinam, Karaikal. Therefore, the petitioner was constrained to file another writ petition for a mandamus to the respondents 1 and 2 to restrain the respondents 3 and 4 from running the liquor shop mentioned above. This writ petition is W.P.No.22114/2006. On 11.7.2006, interim injunction was granted by this Court in W.P.No.22114/2006.

5.Immediately, the respondents 3 and 4 filed their counter and it was submitted that the injunction causes recurring financial loss and therefore, the matter must be taken emergently. Thereafter, the State too filed its counter. A reply was filed by the petitioner and the matter was heard.

6.The 3rd respondent filed his counter in his personal capacity and official capacity as 2nd

respondent in W.P.No.22114/2006. All the allegations in the writ petition were denied and it was submitted that the business carried on by the petitioner was done in the name of M/s.Shanmuga Wines and that it is a registered partnership firm formed under a deed of partnership dated 01.04.1984 and as per the said deed, the partners are (1)K.Krishnan, (2)U.S.S.Syed Ibrahim (3rd respondent in W.P.22114/2006), (3) T.K.K.Chinna Kamatchi Gowder, (4)V.Gandhimathi (The petitioner herein), (5)B.Thirumalai Rayan (4th respondent in W.P.22114/2006)and (6)M.Sankaran; and that while the partners No.2 and 5 were appointed as Managing Partners, the petitioner was only the sleeping partner. The managing partners had authorised on Kumaresan to carry out all the works pertaining to the running of the business.

7. The 3rd respondent had addressed a letter to the Registrar of Companies and Firms to ascertain the correctness and genuineness of the claims made regarding the names of the partners of M/s.Shanmuga Wines and the details were also furnished by the Registrar which were in conformity with the names of partners given above. It appears that the respondent on receipt of the legal notice from the petitioner called upon her to appear before him on 9.11.2005 to substantiate her claim. There was no response from her. On the other hand, an application was made by the aforesaid Kumaresan for shifting of the retail shop. The matter was placed before the Government and in accordance with the provisions of the Act, 25% of the licence fee was also paid. The shifting order was passed on 7.4.2006 and it was given effect to on 15.5.2006.

8. According to this respondent, the shifting was done strictly in accordance with the relevant Rules and there are no mala fides in the action. Though several opportunities were given to the petitioner to substantiate her claim, she did not avail of the opportunity. It is also alleged that the petitioner is deliberately misleading the Court by stating that there was an act of transfer of licence. While "in fact there is no transfer of licence at all nor was there any licence ordered to be transferred from the name of the petitioner to anyone". According to the respondent there was no amendment of licence and the name of the licence has been specified in the statutory format and that the terms of the licence were within the knowledge of the writ petitioner.

9. It is also averred in the counter that the words "other partners" in the licence have been used for over a decade and the petitioner cannot now turn round and object to it. The petitioner cannot pursue her remedy in the writ Court but has to file the statutory appeal. A separate counter was filed by the 3rd respondent denying the malafides. An additional counter was also filed in which it is stated that though in the format issued to the licensee the words "other partners" is used. The names of the partners have been incorporated in the ledger and therefore,the format of licence that has been issued is in conformity with the Rules and the names of the licensee as per the entry is "Tmt.V.Gandhimathi and other partners".

10.The respondents 3 and 4 had the strongest objection to the prayer sought for by the writ petitioner. According to the respondents 3 and 4, the petitioner has suppressed several facts and therefore, she is not entitled to the discretionary remedy under Article 226. Though the petitioner knew that respondents 3 and 4 were managing partners of M/s.Shanmuga Wines, they have been shown only in the individual capacity. The business of Shanmuga Wines has been running from even prior to 1983. Some partners have retired and the firm has been reconstituted.

11. As per Clause 18 of the partnership deed it was agreed that though the licence would stand in the name of the petitioner it will be the property of the firm and she will have no individual claim or right in the licence. There is no transfer of licence but only shifting of premises and the relevant Rules have been complied with. It was therefore, prayed that this person who has come to Court with unclean hands should not be granted any relief.

12. In the reply affidavit it is submitted that the partnership deed relied on by the respondent was not within the possession of the petitioner and it is only after all the documents were provided to her after she made a request under the right to information Act that she got the details. In this reply, it is stated that there are 2 partnership deeds, one which is said to have been entered on 1.4.84 and the other on 7.1.1989. The petitioner denies the existence and incorporation of the partnership in the licence. There is no suppression of facts and what is necessary for granting of relief in the writ petition have been placed before this Court.

13. The learned Senior Counsel appearing for the writ petitioner would submit that Rule 114 requires the business to include the names of the partners. The learned Senior Counsel also submitted that there can be no shifting of the premises unless Rule 209 is complied with. The learned Senior Counsel also submitted that as far as the Licensing Authority is concerned, the licence stands in the name of the petitioner and the fact that with the licence a partnership business is conducted is not relevant in so far as the Licensing Authority is concerned and for this purpose, a judgment of the Division Bench in W.A.485/1979 (A.Muthukumaran Vs. The Commissioner of Lnad Revenue, Board of Revenue, Madras and others) was relied on. There the point was whether the licensee under the Tamilnadu Cinema Regulation Act can be held to have transferred the licence because he took in a partner for running up the business. The learned Single Judge held that over the licence issued under the Act is personally to the person to whom it is granted and by taking a partner there is a transfer or assignment of the licence to the partner who is newly inducted. The Division Bench after considering various decisions, held that the licensee had not contravened the conditions of licence by taking any others as partners and that there is absolutely no transfer or assignment of the licence in favour of the partner and the partners who had entered into the partnership are interested only in sharing of the profits and it is nothing to do with the licence as such.

14. Therefore, according to the learned Senior Counsel merely because M/s. Shanmuga Wines is a partnership firm. it would not automatically mean that the partnership is the licensee when even as per the partnership deed that is the licence stands in the name of the petitioner. The learned Senior Counsel submitted that the real issue in the writ petition cannot be diluted by bringing dealing with the inter-se rights of the partners in the firm. What is relevant for this writ petition was whether the premises for which the licence is granted could be shifted without the permission or without the request of the person in whose name the licence stood especially when the licensee had been objecting to the same.

15. Mr.T.Murugesan, learned Government Pleader appearing for respondents 1 and 2 would submit that there was a request from a person claiming to be the authorised representative of the managing partners. The necessary documents were produced and in the previous Excise year there was an endorsement in the licence including the names of the partners and on the basis of the records the shifting of the premises was done. There was neither mala fide nor any illegality.

16. The learned counsel appearing for the respondents 3 and 4 submitted that the petitioner who had come to Court with a case that she was an individual licensee is now trying to obscure the facts she had claimed that she was not aware of the fact that she was a partner and that the partnership deed was brought about without her knowledge. At the same time, in the reply affidavit there is a reference to two partnership deeds. This would clearly show that the petitioner had knowledge of the partnership deed and had still burked the fact from the Court and in such a case, the petitioner is not entitled to any relief.

17.Learned counsel also submitted that when the partnership deed clearly limits the role to be played by the petitioner in the partnership firm and when the respondents 3 and 4 are the managing

partners it is open to them to shift the premises and in this case the shifting was necessitated because there was insufficiency of parking space in the old premises and therefore, for improvement of business the shifting was applied for. There was a proper application for shifting and the same has been granted after compliance with the Rules and the petitioner can have no objection to the same.

18. He relied on 1999 W.L.R.342 (Trichy Thanjavur Pudukkotai Quaid-e-Milleth District Cinema Distributors Association rep.by its Secretary Devaraj Vs. The District Registrar of Societies, Trichi and others) it was held that if the matter had to be decided on the basis of the authorities that was relied on, the decision could go only in favour of the petitioner and though the statute provides only for communicating the results of the enquiry, principles of natural justice had been made applicable in the decisions relied on by the petitioner therein. But yet, the learned Judge declined to grant the relief to the petitioner since it was found "that the affidavit is nothing but a statement of falsehood and there is also material suppression of facts" and further " since I held that the petitioner has not come to Court with clean hands and has suppressed material facts, the equitable jurisdiction of this Court under Article 226 of the Constitution of India cannot be invoked." So the learned counsel for 3rd and 4th respondents submitted that since the petitioner has suppressed the facts, on that ground also the writ petition must be dismissed.

19. The FL-I licence given for the excise year ending 31.3.2005 shows the name of licence holder as Tmt.V.Gandhimathi and other partners. On 27.10.2005 a legal notice was issued by the petitioner to the five persons mentioned in the deed of partnership, the Registrar of Firms, Union of India as well as the 2nd respondent stating that the licence was only in her name and that it is now been transferred to indicate as if the licensee are the petitioner and other partners. The legal notice specifically questions how the name of the licensee was changed by the 2nd respondent without the knowledge of the petitioner. The notice called upon the Authorities to conduct the investigation into the registration of the firm and to annul the same and the transfer of licence if any. On 31.10.2005 the 2nd respondent called upon the petitioner to appear in person on 9.11.2005. In the letter dated 21.11.2005 addressed to the 2nd respondent the petitioner has stated that though she had appeared on 9.11.2005, she was informed that the 2nd respondent was busy with natural calamity and that he was not available. On instructions from the 2nd respondent office, the petitioner had again appeared on 21.11.2005 and again the 2nd respondent was not available. She requested the 2nd respondent to issue fresh notice. On 22.6.2006 another legal notice was issued by the petitioner calling upon the Authorities to close down the shop which is running in the new address. In the typed set of papers filed by the respondents 3 and 4, a copy of the deed of partnership dated 7.1.1989 is enclosed. Copies of FL-I licence have been issued for various years to show that all along the name of the licence holder was Tmt.V.Gandhimathi and other partners. For the first time in the licence given in the year ending 31.3.2006, an endorsement is made as follows:

"Endt.No.5320/DCE/C2/2005 dt.29.06.2005

As per letter No.201/85/433/TPA/2005 dt.24.06.2005 of the Registrar of Companies, Pondichery, the names of Tvl.U.S.S.SYED IBRAHIM and B.THIRUMALAIRAYAN have been incorporated as Managing Partners and the names of Tvl.i)K.KRISHNAN, Trichy-8, ii) T.K.K.CHINNA KAMATCHI GOWDAR, Gudalur, iii) V. GANDHIMATHY, Kottucherry, Karaikal and iv) M. SANKARAN, Ottapidaram have been incorporated as partners in the licence."

20. In the counter of the 2nd respondent, it was stated that though the FL-I format does not bear the names of all the partners the ledge for the relevant years would bear the names of all the partners and therefore, the learned Government Pleader was requested to produce the relevant ledgers. In the year 1996-1997 and 1997-1998, at page 32 and 56 of the ledger, only the petitioner's name is mentioned as licensee. In the year 1998-1999 and 1999-2000 also the partners' names are not

individually mentioned in the ledger. The position is the same with regard to the entries for the year 2000-2001, 2001-2002, 2002-2003, 2003-2004 and 2004-2005. For the first time in the year 2005-2006 the endorsement extracted above, is made. Immediately, the petitioner has addressed a letter to the respondent objecting that the licence has been transferred without her knowledge.

21. Clause 18 of the partnership deed dated 1.4.84, reads then:
'....

18) The licence which stands in the name Thirumathi V. Gandhimathi will be the property of the firm and she has no claim or right whatsoever in the licence in her individual capacity."
22. Assuming that this partnership deed is true which is denied by the petitioner, this is only the internal arrangement amongst the partners as regards their rights. As far as the Authorities are concerned their ledgers or records contained only the petitioner's name until 2005-2006. Though the words "other partners' are found, the individual names of no one else but the petitioner's is found in these records till 2005-2006.

23.There is a letter dated 19.9.2005 which reads as follows:

"To
The Deputy Commissioner-Excise
Karaikal.

Dear Sir,
Sub:Shifting of office premises:-
Ref:Shanmuga Wines FL-I licence No.4/2005-06-C.S.T.No.834/K.R.C. Dt.23.9.85-P.G.S.T.No.401003:-

We are interested to shift our above said office premises to the following address:
Shri Arumugam Complex,
220, 2/5 Gandhi Salai,
Polagam Arch,
Thirumalairayan Pattinam,
Pin Code-609 606.

We request your good self to kindly grand as permission for shifting.

Thanking You,

Yours faithfully,

Sd/-
G. KUMARESAN."

24. The person who has signed this letter, namely Kumaresan does not show in what capacity he has signed. Kumaresan's name is not found in the endorsement extracted above. No document is enclosed along with this letter to show under what authority it is issued. The Authorities appear to have acceded to the request and on 7.4.2006 an order was passed that the shifting has been approved subject to the condition laid down in the Excise Act/Rules in force and "further it is directed that the actual shifting of the shop should be done only after elections are over and the fact of shifting after elections may be intimated to the under signed."

25. On 15.5.2006 the aforesaid Kumaresan has written to the 2nd respondent that "We have shifted

M/s.Shanmuga Wines licence premises from Door No.3, Main Road, Kottucherry, Karaikal to Door No.220, 2/5 Gandhi Salai, Polagam Arch, Thirumalairayan Pattinam". As early as 27.10.2005, the petitioner has lodged her protest and has stated that FL-I licence of the shop has been transferred from her name as "The Sole Proprietrix" to "Tmt.V.Gandhimathi and other partners." This legal notice and subsequent notices were addressed to the 2nd respondent. The petitioner has been repeatedly asking for an opportunity to be heard before the licence is shifted. Twice she had appeared at the Office of the 2nd respondent and on both occasions he was not available. She requested him to give a date on which she could be present along with necessary documents. The records do not show that any such notice was issued to 2nd respondent and on the basis of a letter given by one Kumaresan, the 2nd respondent has ordered the shifting of the premises.

26.The 3rd and 4th respondents claim to have appointed Kumaresan to act on their behalf, and that they are the managing partners. There may be dispute regarding the rights of the partners in this writ petition. We are not concerned with any of those. The rights and liabilities and the demands between the partners against each other will be resolved in the appropriate forum. What is to be considered in this case is whether the Authorities have acted in accordance with law while ordering the shifting of the premises. As already stated as far as the authorities are concerned, the records bear only one name and that is the petitioner's name. Allegations of malafides have been made. But we will assume that the 2nd respondent was only persuaded by the production of the partnership deed and was inclined to accept the case of the respondents 3 and 4 that there was a partnership and that the respondents are managing partners. Even so since the licence stands in the name of the petitioner, they were bound to hear her before they order the shifting of the premises. Rule 113 of the Act deals with licences. The Rule refers to "licensed premises". Rule 114 of the Act reads as follows:
"Application for licence:-(1) Any person desiring to obtain a licence under these rules shall make an application to the Licencing Authority in that behalf.

(2) The application shall contain the following particulars namely:-
(i) Name and address of the applicant;

(ii) If the applicant is a company or a firm, the names and address of all the directors or partners of the company or firm; and

(iii) Location of the premises where the applicant intends to conduct the business under a licence.

(3) If any applicant applying for a licence under these rules shall along with his application give a clearance certificate issued by the Commercial Tax Department."

Rule 116 of the Act reads as follows:

"Restriction on the use of premises:- No premises shall be used for the sale of Indian or foreign liquor or both unless it is approved by the Deputy Commissioner of the region."

Rule 163 of the Act reads as follows:

"Shifting of the shop:- The Licensing Authority may either on the application of the licensee or otherwise and for reasons to be recorded in writing, direct the shifting of a shop from one place to another and a licensee shall not be entitled to any compensation on account of such shifting."

Rule 209 of the Act reads as follows:

"Shifting of shops:- The licensee shall not shift the licensed premises from one place to another without the prior approval of the Licensing Authority."

27. Therefore, the licence is specific to "the premises" too. And if there is any contravention or unauthorised shifting it is the licence holders who is liable. The petitioner is definitely a person entitled to be "heard" if the shop is shifted. The shifting is done on the application of the licence or otherwise for reasons to be recorded. Here, the respondents claim that they shifted it on application. This application is not made by the licensee. The petitioner in whose name it has stood for years, wanted to be "heard" before it is shifted. She has not been given the opportunity. It is not necessary to look anywhere else. The facts speak for themselves. There has been a total violation of the principles of natural justice.

28.The Memorandum dated 7.4.2006 by which the licensee M/s.Shanmuga Wines is informed that the proposal for shifting the licence has been approved does not give any reasons as Rule 163 would clearly states for reasons for shifting if it is not on the application of the licensee. On 3.2.2006 the petitioner has applied under the right to Information Act to the respondents for certain documents. We have already seen the number of letters that have come from the petitioner to the 2nd respondent asking for an audience and yet when a copy of this order is marked, the petitioner's name is not even mentioned. It is addressed to the licensee M/s.Shanmuga Wines, Karaikal. The documents indicate that the 2nd respondent was not inclined to afford any opportunity to the petitioner. Every state action must satisfy the test of non-arbitrariness.

29. The order shifting the premises clearly is arbitrary and must be quashed. The business of M/s.Shanmuga Wines shall be conducted in the new premises only after the petitioner is heard and thereafter, the respondents are satisfied that there has been a proper application and as per the Rules and Regulations, there should be shifting of premises. Until then, the business of M/s.Shanmuga Wines shall be carried on only in the premises for which the licence was originally granted.

29. Accordingly, the writ petitions are allowed. No costs.

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To

1.The Excise Commissioner,
Pondicherry.

2.The Deputy Commissioner (Excise)
karaikal, Pondicherry.

[PRV/7621]